

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1155

*MM
JCS*

SPANISH LAKE WILDLIFE REFUGE AND BOTANICAL GARDENS,
INC., D/B/A ALLIGATOR BAYOU SWAMP TOURS, BLUFF
SWAMP WILDLIFE REFUGE AND BOTANICAL GARDENS, INC.,
AND FRANK BONIFAY

VERSUS

THE PARISH OF ASCENSION, THROUGH TOMMY MARTINEZ
IN HIS OFFICIAL CAPACITY AS ASCENSION PARISH PRESIDENT,
AND THE PARISH OF IBERVILLE, THROUGH JESSEL MITCHELL OURSO,
JR. IN HIS CAPACITY AS IBERVILLE PARISH PRESIDENT

Judgment Rendered: MAR 19 2014

APPEALED FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ASCENSION
STATE OF LOUISIANA
DOCKET NUMBER 93,297

HONORABLE THOMAS J. KLIEBERT, JR., JUDGE

JMS McClenda, J. concurs.

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

The facts of this case are taken from a previous opinion of this court, **Spanish Lake Wildlife Refuge & Botanical Gardens, Inc. v. Parish of Ascension ex rel Martinez**, 2011-1882 (La. App. 1 Cir. 5/4/12) 2012 WL 1580760, (unpublished) writ denied, 2012-1677 (La. 11/02/12), 99 So.3d 671.

The plaintiffs/appellants, Spanish Lake Wildlife Refuge & Botanical Gardens, Inc., doing business as Alligator Bayou Swamp Tours, Bluff Swamp Wildlife Refuge and Botanical Gardens, Inc., and Frank Bonifay (hereafter referred to collectively as “ABST”) appeal the decision of the 23rd Judicial District Court for the Parish of Ascension, which granted partial summary judgment in favor of the defendants/appellees, the Parish of Ascension through Tommy Martinez in his official capacity as Ascension Parish President and the Parish of Iberville through Jessel Mitchel Ourso, Jr., in his official capacity as Iberville Parish President (hereinafter referred to collectively as “The Parishes”), and denied ABST’s own motion for partial summary judgment. The City of St. Gabriel, Spanish Lake Mitigation Area, LLC, Land Investments of Louisiana, Inc., and Jarrell Holdings, LLC, have all intervened in this suit as defendants/appellees. For the following reasons, we affirm the decision of the lower court.

FACTS AND PROCEDURAL HISTORY

ABST filed a petition for injunction and damages against the Parishes on July 23, 2009, in which they claim that their lucrative swamp tour business had to be shut down due to the Parishes’ opening of a flood gate located in Ascension Parish on or about March 24, 2009. The record indicates that Alligator Bayou has historically been maintained at a level between 3.8 to 4 feet in depth, and ABST claim they were able to operate their business and their tour barge at that water level. ABST claim that the bayou was completely drained, grounding their barge and bringing their swamp tour business to a halt. ABST further claim that the joint action of the Parishes was in contravention of a June 1, 2009 Ascension Parish resolution to keep the flood gate closed and maintain the bayou’s level at 4 feet. ABST further claim that the actions of the Parishes destroyed the navigability of Alligator Bayou, thereby depriving ABST of their riparian right to access the bayou. ABST also claim that the actions of the parishes have destroyed the local fish and wildlife, killed a number of cypress trees located on their property, and have prevented ABST from further use and improvement of their land.

ABST therefore prayed to enjoin the Parishes from further damaging their property and the surrounding ecosystem, and to make Alligator Bayou navigable once again by closing the flood gate. ABST also claim damages to their business, to the property itself, and other general and special damages.

ABST pled under the theory of inverse condemnation, which provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity having the powers of eminent domain where no expropriation has commenced. . . . ABST claim the Parishes acted without notifying ABST beforehand, knowing how their actions would impact ABST, and did not compensate ABST for their loss. ABST further claim the Parishes' acts were delictual, and that for many years ABST relied on representations by the Parishes that the navigability of Alligator Bayou would be maintained, to their detriment.

The Parishes answered by stating their decision to open the flood gate was intended to meet a public need, which was to prevent backwater flooding on properties located on Spanish Lake Basin in Iberville Parish. The Parishes claimed this flood water is supposed to naturally flow from Spanish Lake to Bayou Manchac through Alligator Bayou, and that Alligator Bayou was drained to create capacity for the backflow water as it drains from Spanish Lake. Doing so saved the landowners on Spanish Lake Basin from losing their property due to flooding.

Then, beginning in December of 2009, water from Spanish Lake began to take what the Parishes consider to be its natural course. It flowed through Alligator Bayou to Bayou Manchac, alleviating the backwater flooding of Spanish Lake Basin. As a result, much of that water settled in Alligator Bayou, raising the water level to approximately 9 feet. Alligator Bayou went from being drained, as complained of in ABST's original petition, to being even higher than what had been maintained prior to the flood gates' opening in March of 2009. ABST filed an amended petition for damages on May 20, 2010, amending the claims to reflect damages for the Parishes' flooding of their property by leaving the flood gates open so that water from Spanish Lake would flow into Alligator Bayou and inundate ABST's property. Despite the water level of Alligator Bayou being restored past the level that ABST had enjoyed prior to the flood gates being opened, ABST still claimed that a constitutional "taking" was committed by the Parishes' impairing the navigability of the bayou. As a result, ABST claimed that they were still deprived of their riparian right, that their property had been damaged and its usefulness destroyed, and that their swamp tour business no longer exists due to the Parishes' actions.

ABST filed a partial motion for summary judgment on October 6, 2010. The sole issue of the motion is whether the actions of the Parishes constitute a "taking" or inverse condemnation, for which ABST should be compensated. . . .

In response, the Parishes filed their own motion for partial summary judgment on February 25, 2011, on the same issue of inverse condemnation. The Parishes' claim is that there is no genuine issue of material fact for ABST to assert because ABST were

attempting to claim a private property right in a navigable waterway (Alligator Bayou), which is a public thing according to La.C.C. art. 450, and not capable of being owned privately. Therefore, there can be no constitutional “taking” suffered by ABST if they do not own the subject land.

The judgment of the trial court on the motions for partial summary judgment, rendered and signed on May 26, 2011, denied ABST’s motion and granted the Parishes’ motion, dismissing ABST’s claim of inverse condemnation with prejudice. The judgment further designates itself as a final judgment for the purposes of La.C.C.P. art. 1915(B) to avoid any under delay in the proceedings. ABST filed a motion to appeal the lower court on July 6, 2011. The motion was granted, and the appeal is now before this Court.

In that portion of this case, this court determined that ABST had to show that its private property right was taken, destroyed, or impaired by the Parishes for a public use. As to its right to conduct a business, this court found that ABST did not prove that such a right existed. This court determined that although ABST did enjoy a riparian right to Alligator Bayou (which was a property right) that right endured and was not lost or taken by government intervention. Further, this court found that no other private property rights existed for ABST past the banks of Alligator Bayou. This court affirmed the district court judgment denying ABST’s motion for partial summary judgment and granting the Parishes’ partial motions for summary judgment.

THE PRESENT APPEAL

On October 23, 2012, the Parishes filed a motion for summary judgment asserting that there were no genuine issues of material facts as to the plaintiffs’ remaining claims. The Parishes asserted that ABST’s complaint was that the Parishes refused to block a natural drainage servitude. The Parishes admitted that they refused to block a natural drainage servitude, but maintained that they were prohibited by law from blocking a natural drainage servitude, thus the plaintiffs’ claims should be dismissed. The East Ascension Consolidated Gravity Drainage District No. 1 and the City of St. Gabriel joined in the motion for summary

judgment.¹

After a hearing on December 10, 2012, the district court granted the motion for summary judgment, dismissing ABST's petition with prejudice. ABST is appealing that judgment. ABST makes two assignments of error on appeal, asserting that: (1) the district court erred by failing to recognize federal jurisdiction over a navigable waterway, and (2) despite the Parishes' duty to protect their citizens, there was still an obligation to obtain federal approval of any intent to drain a navigable waterway.

THE STANDARD OF REVIEW

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover-appellant is entitled to judgment as a matter of law. **Janney v. Pearce**, 2009-2103 (La. App. 1 Cir. 5/7/10), 40 So.3d 285, 289, writ denied, 2010-1356 (La. 9/24/10), 45 So.3d 1078.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, ABST maintains that the district court has approved the altering/draining of a navigable waterway by state or parish authorities, although federal law mandates that the federal government has exclusive jurisdiction over the waterway, and the draining of the waterway without federal approval would violate federal law.

As this court stated in the previous appeal, the Parishes did not direct the water to flow anywhere other than its *natural* course. So, while ABST maintains that the district court approved the altering/draining of a navigable waterway, the

¹ We still refer to all defendants herein as "The Parishes."

Parishes, in fact, only allowed the water to take its *natural* course.

ABST maintains that it relied upon the higher, artificial water level in Alligator Bayou to float a tour boat. ABST states in its brief:

In May, 2009, Iberville's Parish President contacted Ascension's Parish President in order to have the floodgate opened and to remain open until further notice. Ascension complied and the gate was opened. The net effect was the lowering of the historically, artificially-maintained water level. The result was a water level that was insufficient for the plaintiffs' water craft to operate, and hence, its tour business failed.

While ABST maintains that the Parishes illegally altered/draind the navigable waterway, it essentially asserts that the Parishes were required to block the natural drainage of Alligator Bayou and maintain an artificially high water level in Alligator Bayou so that ABST could continue its business.

In **Safford v. Bayou Lafourche Fresh Water Dist.**, 2003-0700 (La. App. 1 Cir. 2/23/04), 872 So.2d 1127, writ denied, 2004-0747 (La. 5/7/04), 872 So.2d 1086, this court found that the District did not owe Mr. Safford the duty to maintain a certain water level within water bodies owned by the State. In that case the plaintiff, Mr. Safford, owned property situated on Bayou Lafourche within Donaldsonville's corporate limits. Mr. Safford purchased the property in 1983, and thereafter constructed a bulkhead, a dog pen, and a boat shed on riparian land near Bayou Lafourche. In his lawsuit, Mr. Safford asserted that around 1994 he began experiencing flooding from Bayou Lafourche's continuously rising level, and he claimed that his construction works were damaged by the bayou's elevated water levels in October 1996 and September 1998. In his suit against the District, he claimed damages including the erosion of his bulkhead, the loss of a septic tank, lost profits for his personal businesses conducted on the property, and loss of or damage to movable property.

The trial court awarded Mr. Safford \$3,270.00 for the repair of his bulkhead and denied any further relief, finding that Mr. Safford failed to prove any

additional damages were caused by the District. Mr. Safford appealed the judgment and the District answered the appeal.

This court reversed the judgment against the District, stating in part:

[A]s Mr. Safford's property is on the shore of a navigable bayou, it is subject to any predial servitude imposed for the public utility. La. C.C. art. 665. As the District's full name connotes, its mission is to ensure the provision of fresh water for the benefit of residents within its boundaries. The evidence shows that its present mission does not relate solely to fresh water intended for human or livestock consumption, but also that needed for industrial, agricultural, and environmental purposes. Clearly, Mr. Safford's individual interests in his property constructed on state land, even with the tacit or express consent of the state, must yield to the public's common interest. In short, we conclude that the *District did not owe Mr. Safford any duty to maintain a certain water level within the boundaries of the water bottom owned by the state*, who delegated to the District its duties pertaining to the supply of fresh water.

Safford, 872 So.2d at 1131. (Footnote omitted, emphasis added.)

This court found in **Safford** that the District did not owe Mr. Safford a duty to maintain a certain water level. That is the same duty that ABST is arguing that the Parishes owed it, a duty to maintain an artificially high water level in Alligator Bayou so that ABST could continue its business.

State law provides the Parishes with the authority to regulate drainage in their respective parishes and perform all work connected therewith. Louisiana Revised Statutes 33:1236 provides that:

The police juries and other parish governing authorities shall have the following powers:

.....

(13) To construct and maintain drainage, drainage ditches, and drainage canals; to open any and all drains which they may deem necessary and to do and perform all work in connection therewith; to cut and open new drains, ditches and canals, to acquire lands for necessary public purposes, including rights of way, canals and ditches by expropriation, purchase, prescription or by donation; to enter into contracts for the construction of such drainage works, and to purchase machinery and have the work performed under their own supervision; to allocate, use and expend the general alimony of the parish for any of the above purposes; to incur debt and issue bonds for drainage and drainage canals in the manner provided for by Subtitle II of Title 39;

and use such other funds as may be legally expended for such purposes; to levy taxes for the maintenance of said drainage works in the manner provided for and under the authority of Article X, Section 10 of the Constitution of the State of Louisiana, as amended, and to construct any works and do any and all things necessary to effect proper drainage and carry this Paragraph into effect; to enter into contracts or agreements, under such terms and conditions as may be mutually agreeable with the State of Louisiana, through the Department of Public Works for the securing of State aid for the purposes herein authorized; to cooperate and participate in any State or Federal aid program which may now exist or which may hereafter come into effect under any State or Federal law. Police juries shall open all natural drains which they deem necessary in their respective parishes and shall perform all work connected therewith, which they may deem necessary to make the opening of natural drains effective. They may perform all other acts necessary to fully drain all the land in their respective parishes and maintain such drainage when established. This Paragraph is intended to furnish additional means whereby parishes in the State of Louisiana may accomplish the objects and purposes herein referred to, and shall be liberally interpreted.

The Parishes have the authority to provide for drainage works and maintain drainage when established, and this shall be liberally interpreted. We find no duty on the part of the Parishes to maintain an artificially high water level in Alligator Bayou for benefit of ABST's business. This assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, ABST maintains that the Army's Corps of Engineers has jurisdiction over every navigable waterway under Section 10 of the Rivers and Harbors Act of 1899 (RHA Section 10), codified at 33 U.S.C. § 403. ABST asserts that the text of the RHA Section 10 is universal, with no exceptions, and virtually all activities on navigable waterways require an Army Corps of Engineers permit prior to the activity, which ABST asserts the Parishes did not have prior to opening the floodgate. 33 U.S.C. § 403 provides:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers

and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

In **California v. Sierra Club**, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981), an environmental organization and two private citizens sought to enjoin the construction and operation of water diversion facilities that were part of the California Water Project. They relied upon the RHA Section 10. The court squarely faced the question of whether, since the Act did not explicitly create a private enforcement mechanism, a private right of action could be implied on behalf of those allegedly injured by a claimed violation of the RHA Section 10. The court found that “in enacting the Act, Congress was concerned not with private rights but with the Federal Government’s ability to respond to obstructions on navigable waterways.” **California v. Sierra Club**, 451 U.S. at 296, 101 S.Ct. at 1780. Further, the court noted:

The language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the especial benefit of a class of persons but rather that it was intended to benefit the public at large through a general regulatory scheme to be administered by the then Secretary of War. Nor is there any evidence that Congress anticipated that there would be a private remedy.

California v. Sierra Club, 451 U.S. at 297-298, 101 S.Ct. at 1781. The court held that there is no private right of action for an alleged violation of RHA Section 10.

Thus, ABST has no private right of action under 33 U.S.C. § 403. This assignment of error has no merit.

DECREE

For the foregoing reasons, the district court judgment granting the Parishes’ motion for summary judgment, and dismissing ABST’s petition with prejudice on

January 25, 2013, is affirmed. Costs are assessed against ABST.

AFFIRMED.